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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1362~~ 135

PAUL R. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Paul R. Jones, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, which affirmed your petitioner's conviction for perjury (in an affidavit) after jury trial in the United States District Court for the Southern District of New York.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, which has not yet been reported, is annexed hereto as Appendix A. There was no opinion on its denial of petition for rehearing. There was no opinion in the District Court.

Jurisdiction

The order sought to be reviewed was made and entered on March 14, 1967. (It appears only in the annexed opinion.) An order denying a timely motion for rehearing was made and entered on April 6, 1967. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S. Code § 1254(1).

Questions Presented

1. Whether there is any law of the United States which authorizes an oath to be administered by a state notary public for an affidavit used on a motion in a federal criminal case, so as to bring such an affidavit (if perjurious) within the federal perjury statute?

2. Whether the testimony of a person before a federal grand jury given under the compulsion of a subpoena, when he is a target of the investigation, may later be used as evidence against him without violating his Fifth Amendment privilege against self-incrimination, especially when he is not advised that he is a target of the investigation?

3. Whether the constitutional right to a speedy trial under the Fifth and Sixth Amendments to the United States Constitution was denied to petitioner when the federal prosecutor marked his case off the calendar when petitioner's counsel was not present, without petitioner's consent, without petitioner understanding the effect thereof or being advised of his right to a speedy trial, and when the case is not tried for some three years, especially when in the interim petitioner is (incorrectly) advised by federal authorities that his case has been dismissed?

4. Whether, under Rule 8(b) of the Federal Rules of Criminal Procedure, an indictment may contain one count charging solely one perjury committed by one defendant, and another count charging solely another perjury com-

mitted by the other defendant at a different time, without any allegation that either defendant participated in the other's perjury?

5. When a witness (petitioner) executes an affidavit knowing it is to be used in support of a convict's motion for a new trial, after discussing said affidavit with the convict and the convict's lawyer, and the convict several weeks thereafter makes his own affidavit for the same purpose while in jail, and each is later separately indicted in a separate count in the same indictment for perjury solely in his respective affidavit—without any charge of conspiracy, joint action, or aiding and abetting—, and the convict does not testify at the trial,

(a) May the contents of the convict's affidavit be considered in evidence against the witness, merely upon a jury finding that the witness furnished his affidavit as part of a common agreement to secure a new trial for the convict by motion—without the jury being required to find that such agreement, its objective, or the means by which it was to be executed were illegal,—all in the absence of any evidence to show that the witness had any knowledge of the contents of the convict's later affidavit or reason to know what such affidavit might contain?

(b) Was the convict's later testimony, given voluntarily to a grand jury investigating possible perjury (after the witness had already testified before it), properly submitted to the trial jury under an instruction that it was admissible only as to the convict, that it was admissible "similarly" to the convict's affidavit, and that the convict's affidavit was admissible against the witness if the witness had given his own affidavit as part of the agreement to obtain a new trial?

(c) Does such use of the convict's affidavit or grand jury testimony violate the witness' right to confront and

cross-examine his accuser under the Fifth and Sixth Amendments?

(d) Should the motion for severance under Rule 14 have been granted?

6. Whether there was sufficient evidence upon which to affirm the verdict of guilt of perjury, when the only evidence of petitioner's wilfulness was the convict's said affidavit, and the convict's said grand jury testimony?

7. Whether a federal indictment sufficiently informed the accused of the nature and cause of the accusation against him, as required by the Sixth Amendment, when his alleged perjury allegedly lay in swearing that an event took place "At the last moment and just before the government rested its case", and the event occurred after the government rested its case the first time, but before it had rested its case the second time, the indictment being silent as to which resting the accused meant in his affidavit?

Constitutional Provisions, Statutes and Rules Involved

Since these are lengthy, their pertinent text is set forth in Appendix B hereto. Their citation is as follows:

United States Constitution: Article I, §§ 1, 7 and 8; Fifth and Sixth Amendments.

Statutes: 18 U.S. Code § 1621, 62 Stat. 73, 78 Stat. 995.

Act of August 15, 1876, c. 304, 19 Stat. 206 [U.S. Comp. St. 1091, p. 662].

Act of June 25, 1948, c. 646, § 39, 62 Stat. 869, 992, 994.

5 U.S. Code § 92, 29 Stat. 184.

5 U.S. Code § 92(a), 44 Stat. 830.

18 U.S. Code § 3772, 63 Stat. 98.

Federal Rules of Criminal Procedure: Rules 8(b), 14, 33, and 47.

STATEMENT OF THE CASE

Leo B. Mittelman was convicted in 1960 in the Southern District of New York of mail fraud and conspiracy.* During that trial, the Government rested twice—on both May 2, 1960 (GA 23a)** and May 12, 1960 (JA 54).***

On April 2, 1962, at Mittelman's request, petitioner made an affidavit at the office of Mittelman's attorney, being advised that Mittelman intended to use it in connection with a motion for a new trial. It was sworn to before a state notary public; it did not bear a notarial seal. Petitioner's six-page affidavit related detailed alleged falsities in testimony of two major witnesses at Mittelman's trial, to which petitioner had been subpoenaed to appear by the government, remaining in New York for many weeks. He then related (¶ 4) that "At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town." (App. A, p. 3a).

In the next paragraph (5), petitioner related that "The government told me about 5:00 o'clock in the evening that it was not going to use me", that he left New York that night on a three-week trip to Texas, during which he could not have been located (App. A, p. 4a).

Some six weeks after petitioner executed his affidavit, Mittelman executed his own affidavit while in a federal jail (GA 45a-7a). He recited that he had met with petitioner on several occasions during the presentation of the prosecution's case, and that "Before I could make up my mind

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* *United States* v. *Crosby, et al.*, 294 F. 2d 928 (2d Cir. 1961), cert. den. sub. nom. *Mittelman* v. *United States*, 368 U.S. 984 (1962).

** Such references are to the Appendix for the United States below.

*** Such references are to Appellants' Joint Appendix below.

whether to issue a subpoena [for petitioner], or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located" (App. A, p. 5a).

Petitioner and Mittelman were both later indicted for perjury in one indictment. The first count thereof charged petitioner with perjury in his April 2, 1962 affidavit, in that petitioner had met with Mittelman on May 4, 1960, after the government had rested its case (App. A, p. 4a(9)). The second count charged Mittelman with perjury in his May 15, 1962 affidavit, in that he had met with petitioner on the same May 4, 1960 date (App. A, p. 5a(11)). For purposes of this proceeding, we do not dispute the sufficiency of the evidence showing that a meeting between petitioner and Mittelman occurred on May 4, 1960 at the Royalton Hotel in New York City.

The Grand Jury's Investigation Prior to Its Indictment

Petitioner was subpoenaed to appear before the grand jury on August 1, 1962 (SM 337,* JA 30). He had not consulted an attorney in regard to his appearance, and was not advised of right to counsel. He was not advised that he was a target of the investigation, nor of its subject matter (JA 30-1). He explained that he had made three trips to New York during the course of the Mittelman trial (JA 35). The meeting with Mittelman at the Royalton, he testified, occurred during his second trip (JA 34, 46), when he believed the government was still presenting its case (JA 44, 47), since he was still here at government expense (JA 43, 47). No evidence was introduced by the government to show that he was not in New York at government expense on May 4, 1960, the date of the Royalton meeting.

He explained that the fourth paragraph of his affidavit related to his second trip to New York, that he was told

* Such references are to the Stenographer's Minutes of the trial.

by the prosecutor he could leave town after the second trip and was excused, but not released, from the subpoena (JA 37, 49). It was only after his third trip to New York—made when the defense had begun its case (JA 32)—, that the government told him he was released from subpeona and that he took his trip to Texas, these being the events related in the fifth paragraph of his affidavit (JA 49-50, 36-7).

Petitioner testified that all he had been asked for by Mittelman and his attorney was an affidavit that two prosecution witnesses had lied, and that when he left New York the last time, it would have been impossible to reach him; there was no discussion about mentioning the Royalton meeting in his affidavit; there was little discussion (JA 38). Petitioner did mention to Mittelman's attorney that the defense could have called him as a witness if they wanted to but that they had decided not to; he did not go into a discussion with Mittelman's attorney as to whether his affidavit was misleading (JA 40).

Some two weeks later, Mittelman appeared before the grand jury at his own request (JA 10). He was advised that he was a subject of the investigation (SM 245). He testified that the Royalton meeting occurred just after the government had rested its case (JA 15, 16), that at several meetings petitioner had inquired "the status of the case" (JA 26). Mittelman testified that petitioner told him he had been excused as a government witness just before the government rested its case (JA 19). Mittelman testified that just prior to the execution of petitioner's affidavit, they had discussed the Royalton conference held the night before the defense case had begun (JA 17). He testified that his attorney had gone over the facts very carefully with petitioner, that petitioner came back the next day to sign the affidavit (JA 27), and that he had disagreed with petitioner as to the chronology set forth in petitioner's affidavit, on whether petitioner had left immediately, but that petitioner was insistent (JA 18-19, 28).

The Trial

At the trial, petitioner several times renewed his pre-trial severance motion (JA 8-9, 29). It was denied.

Mittelman's grand jury testimony and affidavit were read in evidence. Petitioner's grand jury testimony was also read in evidence.

The trial court instructed the jury that "the government contends that Mr. Mittelman and Mr. Jones submitted affidavits as part of a mutual understanding, plan and agreement to support a motion for a new trial * * *." (GA 99a). This was excepted to (JA 56). The trial court went on to charge as follows (GA 115a-116a)—also excepted to (JA 56):

> "I already have instructed you that the Grand Jury testimony of each defendant was received into evidence only as to the defendant whose testimony it was and not as to the other defendant. But to be sure, I repeat: The Grand Jury testimony of Mittelman is received only as to Mittelman and not as against Jones and, similarly, the Grand Jury testimony of Jones is received only as to Jones and not as against Mittelman. You are not to consider the Grand Jury testimony of Mittelman in determining the guilt or innocence of Jones and you are not to consider the Grand Jury testimony of Jones in determining the guilt or innocence of Mittelman.
>
> "Similarly, Mittelman's affidavit is not admissible as to Jones and Jones' affidavit is not admissible as to Mittelman unless you first find that the government has established Jones' connection with Mittelman's affidavit, and Mittelman's connection with Jones' affidavit.
>
> "By this I mean the following: If you find that Mittelman, either alone or through his duly authorized attorney, knew about, secured and procured Jones' affidavit and knew of the substance of the contents of Jones' affidavit and submitted Jones' affidavit in support of Mittleman's application for a new trial, then you may decide that Mittelman is

bound by Jones' affidavit and the connection would have been established if you so find.

"Similarly, if Jones knew at the time he prepared and signed and swore to his affidavit, if he did swear to his affidavit, that he was submitting this affidavit for the purpose of assisting Mittelman in obtaining a new trial, and if you find or infer, an inference being evidence also, that Jones knew the reason why and the purpose for his affidavit, and if you infer and so find that Jones discussed with Mittelman or with Mittelman's duly authorized attorney his affidavit, as part and parcel of a common agreement or undertaking to secure a new trial by means of a motion for Mittelman, then you may consider, if you so find, Jones' [*sic*] affidavit with respect to Mittelman [*sic*]."

Neither defendant took the stand (both had criminal records).

Defendants were convicted, petitioner being sentenced to eighteen months.

The purported basis for federal jurisdiction in the court of first instance is 18 U. S. Code § 3231, 62 Stat. 826 giving the district court jurisdiction to try offenses against the United States.

Proceedings in the Court of Appeals

The Second Circuit affirmed the convictions on March 14, 1967. Both a petition for rehearing and a supplemental petition for rehearing on behalf of petitioner were timely filed on or before March 29, 1967. In support of the Supplemental Rehearing Petition, petitioner alleged, in a supporting affidavit, that when he appeared in the District Court without his counsel, the prosecutor announced that he was marking the case off the calendar. Petitioner further alleged that at that time he was not advised by anyone that he had a constitutional right to a speedy trial, that he did not understand the effect of marking

the case off the calendar, nor could he recall his ever giving any consent to the case being marked off the calendar. About a year and a half after the case had been marked off the calendar, petitioner alleged, the Internal Revenue authorities advised him that the case against him had been dismissed, and there was therefore no reason for him to consider what could be done to terminate the case. He claimed, *inter alia*, that he had been denied his constitutional right to a speedy trial.

POINT I

This Court should settle an important question of federal law which has not been settled by it: whether there is any law of the United States, authorizing an oath to be administered by a state notary public for an affidavit in a federal criminal case, so as to bring such a perjurious affidavit within the federal perjury statute.

In petitioner's Supplemental Petition for Rehearing, which was denied by the Court of Appeals below, he contended that no law of the United States authorized an oath to be administered to him by a state notary public, and that he could not have committed the crime of perjury by so swearing to an allegedly perjurious affidavit, since under 18 U.S. Code § 1621 wilful false swearing does not constitute perjury unless done "in any case in which a law of the United States authorizes an oath to be administered". The Supplemental Petition for Rehearing was denied. Thus, the Court of Appeals decided this fundamental question of federal law, which indeed goes to the roots of the trial court's very jurisdiction. We believe that this question should be settled by this Court.

A. No law of the United States authorized an oath to be administered for an affidavit to be used on the criminal side of the district court.

Though the Act of August 15, 1876, c. 304, 19 Stat. 206 [U.S. Comp. St. 1091, p. 662] once gave state notaries public the same powers as the then Commissioners of the United States Circuit Court, this Act was repealed by the Act of June 25, 1948, c. 646, § 39, 62 Stat. 869, 992, 994.

While 5 U. S. Code § 92, 29 Stat. 184 does purport to provide for the taking of oaths in certain cases before state notaries public, this Court held in *United States* v. *Curtis*, 107 U.S. 671, 674 (1882) that it was of no effect to give any powers to any state notary public. Moreover, § 92 provides that an oath taken before a state notary public shall have force and effect "when certified under the hand and official seal of such notary"—but there was no seal, official or otherwise, on petitioner's affidavit. Thus, 5 U. S. Code § 92 is in any event inapplicable.

The law apparently relied upon by the Government below was 5 U. S. Code § 92(a), 44 Stat. 830. However, 92(a) is nothing more than a reference to other laws of the United States which authorize or require an oath to be administered, for it merely provides that state notaries public may administer an oath "In all cases in which, under the laws of the United States, oaths are authorized or required to be administered * * *." § 92(a) does not itself authorize the administration of an oath.

We have been unable to find any statute authorizing the administration of the oath here.

The question then arises, do the Federal Rules of Criminal Procedure authorize an oath to be administered on a motion for a new trial—and if so, are the Federal Rules "a law of the United States" within the meaning of 18 U. S. Code § 1621? We submit that both questions must be answered in the negative.

B. The Federal Rules of Criminal Procedure do not authorize the administration of an oath for an affidavit.

The Second Circuit noted in the case of *Perl* v. *United States,* 210 F. 2d 457, 458 (2nd Cir. 1954) that Rule 6(c) of the Federal Rules of Criminal Procedure specifically authorized the administration of an oath before a grand jury. But there is nothing in the Rules of Criminal Procedure specifically authorizing the administration of an oath in connection with a motion for a new trial. While Rule 33 provides for the making of a motion for a new trial, and while Rule 47 provides that an application to the Court for an order shall be made by motion, which "may be supported by affidavit", there is still no provision in the Rules (or elsewhere) which specifically authorizes the administration of the oath for such affidavit. In other words, while the Federal Rules provide that an affidavit may be used, there simply is no provision authorizing the oath to be administered—and 18 U. S. Code § 1621 requires that such a federal law exist before the crime of perjury can be committed. *United States* v. *Curtis, supra,* 107 U.S. at 673.

Moreover, in *Curtis,* this Court expressly distinguished its prior decision in *United States* v. *Bailey,* 9 Pet. 238 (U.S. 1835) a case involving "false swearing", where the penal statute did not require an oath authorized by law. It noted [107 U.S. at 675] that in such a case, a regulation of the Treasury was sufficient to authorize the notary to act. And in *Bailey,* this Court had noted that an indictment for perjury cannot lie in this country where the affidavit was not "authorized by any statute, but was solely dependent upon the practice and usage of the courts * * * "[1] (9 Pet. at 256)—as is the oath involved here.

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[1] All that this Court may prescribe in the Rules of Criminal Procedure are "rules of practice and procedure". 18 U.S.C. § 3772, 63 Stat. 98.

This Court in *Bailey* noted that absent any statute authorizing an oath, a defendant could be prosecuted in England for the common law equivalent of obstruction of justice. But the indictment at bar charged only perjury, not obstruction.

C. Even if the Federal Rules did authorize the administration of an oath, they do not constitute a law of the United States.

This Court, not the Congress, makes the Federal Rules. But the Constitution gives Congress, not this Court, the power "to make all Laws" (Article I, § 8), vesting all "legislative Powers in" Congress (Article I, § 1). And even assuming that the Rules somehow became legislation, every piece of legislation "shall, before it become a Law, be presented to the President of the United States" [United States Constitution, Article I, § 7]—but the Federal Rules were not so presented. Thus, they cannot be a law of the United States. Cf. *Statement of Mr. Justice Black and Mr. Justice Douglas,* 374 U.S. 865, 866 (1963).

Mr. Justice Frankfurter, too, noted that the Federal Rules of Civil Procedure are "Plainly * * * not acts of Congress and can not be treated as such." *Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 18 (1941) (dissenting, but majority did not question this proposition).[2]

Indeed, Congress cannot delegate the law making power to this Court. Long ago, Mr. Chief Justice Marshall ruled that: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman* v. *Southard,* 10 Wheat. 1, 42 (U.S. 1825).

Thus, the Federal Rules can not be "a law".

* * *

The importance of this question cannot be overstressed. Not only does it involve the basic question of whether there can be a federal prosecution for perjury in any affidavit submitted on the criminal side of the district court—it

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[2] See, also, in criticism of the Second Circuit's decision in *Perl, supra* (which decision failed to consider this problem), Wise, "Congressional Abolition of Perjury Before Federal Grand Juries", 7 Univ. of Florida Law Rev. 272 (1954).

reaches as well to affidavits used on the civil side of the district court, inasmuch as there is no specific provision in the Federal Rules of Civil Procedure (or elsewhere) authorizing the administration of an oath. Not only is a decision on this issue vital to federal and state relationships, since most states—as does New York [8]—make the false swearing to an oath before a state notary public a state criminal offense, but it is vitally important to the administration of federal justice to determine whether a federal crime is committed when a perjurious affidavit is sworn to before a state notary public and submitted to a federal court.

POINT II

This Court should settle another important question of federal law which has not been settled by it: whether the grand jury testimony of a subpoenaed prospective defendant may later be used in evidence against him, especially when he was not advised that he was a target of the investigation.

This Court recently ruled that evidence obtained by "a form of compulsion" could not be used against a defendant, in that such use violated the defendant's privilege against self-incrimination. *Garrity* v. *New Jersey*, 385 U.S. 493, 497 (1967). We submit that there is a serious federal constitutional question here: whether a subpoena is to be deemed a form of compulsion, preventing the later use of the testimony so obtained against the defendant.

The New York Court of Appeals has ruled that when "a prospective defendant" is subpoenaed before the grand

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[8] New York's Penal Law, § 1620, defines perjury as wilfully swearing falsely "on any occasion in which an oath is required by law or is necessary for the prosecution or defense of a private right or for the ends of public justice or may lawfully be adminstered * * *". It is readily apparent that a state prosecution for perjury lies in New York for a false affidavit used in a federal proceeding.

jury, "In such a case the subpoena is deemed to be *a form of compulsion,* and the testimony thus compelled may not be used against the defendant * * *" in the light of the state privilege against self-incrimination. *People* v. *Laino,* 10 N.Y. 2d 161, 170-1, 218 N.Y.S. 2d 647, 655, 176 N.E. 2d 571 577 (1961). (Emphasis supplied.) If so, then clearly petitioner's grand jury testimony could not constitutionally have been used against him. That such testimony could not be so used seems implicit, as well, in this Court's opinion in *Lawn* v. *United States,* 355 U.S. 339 (1958).

The United States Court of Appeals for the District of Columbia Circuit has ruled that "there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits * * *" the procedure of subpoenaing a prospective defendant. *Powell* v. *United States,* 226 F. 2d 269, 274 (D.C. Cir. 1955). Some years later, in *Jones* v. *United States,* 342 F. 2d 863 (D.C. Cir. 1964), that Court split on this issue, ruling 5-4 that an indictment could be based on such evidence, over vigorous dissents (*id.* at 867-8)—but the majority noted that it expressed no opinion on the law if grand jury testimony so obtained were later used at defendant's trial, since the testimony there "was not so used in this case" (*Id.* at 881). In the case at bar, it was so used.

The decision below, denying our Supplemental Petition for Rehearing which raised this point, thus decided an important federal constitutional question in a way in conflict with an applicable decision of this Court (*Garrity, supra*), whose importance has been declared by another court of appeals, and which we submit should be settled by this Court.

Moreover, until now it had been accepted federal jurisprudence that it was fatal to an indictment to subpoena a person before the grand jury without advising him that he was a target. *United States* v. *Edgerton,* 80 Fed. 374 (D.C. Montana 1879. But your petitioner was not so advised.

POINT III

This Court should grant review to determine whether the federal procedure of marking cases off the calendar violates the constitutional right to a speedy trial, especially when defendant is later advised by federal agents that the case against him is dismissed.

Federal prosecutors often follow the practice of marking cases off the trial calendar. In the case at bar, petitioner alleged in his Supplemental Petition for Rehearing that this case was so marked off at a time when his counsel was not present, without his consent, without his understanding the effect thereof, and without his being advised that he had a right to a speedy trial. For almost three years, there was no activity in his case. Midway in this period Internal Revenue authorities advised petitioner that his case had been dismissed. (March 27, 1967 Affidavit of Paul R. Jones, submitted in support of Supplemental Petition for Rehearing below). The Court below nonetheless denied the Supplemental Petition for Rehearing, over petitioner's claim that he had been denied a speedy trial in violation of the Sixth Amendment and of due process under the Fifth Amendment.

We submit that it is in the public interest that this Court should promptly rule on the applicability of its decision in *Klopfer* v. *North Carolina*, — U.S. —, 87 S.Ct. 988 (1967) to the federal procedure of marking cases off the calendar, so similar under the facts alleged here to the North Carolina process constitutionally condemned in *Klopfer*.

POINT IV

In ruling that a perjury count solely against one defendant may be joined with another perjury count solely against the co-defendant, in an indictment in which neither defendant is alleged to have participated in the other's perjury by way of conspiracy, aiding and abetting, or otherwise, the Court below rendered a decision in conflict with the decisions of another court of appeals on the same matter, and in a way in conflict with an applicable decision of this Court.

The indictment at bar charged petitioner in the first count with swearing to a false affidavit on April 2, 1962 (App. A, p. 3a(8)). In the second count, it charged Mittelman with swearing to a false affidavit on May 15, 1962 (App. A, p. 4a(10)). It did not allege that petitioner participated in Mittelman's perjury, or that Mittelman participated in petitioner's perjury (App. A, p. 2a, n. 1). It was silent as to who had prepared the affidavits.[4] It did not allege that petitioner knew that an affidavit by Mittleman was to be filed with Mittleman's motion.[5] In short, it alleged completely separate acts of perjury committed separately by each defendant, linked not by any participation in act(s) or transaction(s) constituting the offense of perjury, but

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[4] The opinion below is thus somewhat inaccurate when it recites that "The indictment charged the preparation by Jones and Mittelman of false affidavits as to Jones' availability, to be filed with Mittelman's motion." (App. A, p. 6a). This inaccuracy was called to the attention of the Court below in petitioner's Petition for Rehearing (p. 2).

[5] See n. 4, *supra*.

instead solely by Mittelman's later use of petitioner's affidavit.[6]

The decision below upholding the joinder in such a case is in conflict with the Ninth Circuit, which has only recently reaffirmed its rule that "Where multiple defendants are involved, Rule 8(b) requires that *each* count of the indictment arise out of the 'same series of acts or transactions' in which all of the defendants 'have participated'." *Metheany* v. *United States,* 365 F. 2d 90, 94, n. 4 (9th Cir. 1966). (Emphasis the Court's). There was no allegation in the indictment that petitioner participated in Mittelman's false affidavit, sworn to more than six weeks after petitioner's own affidavit, at a time when Mittleman was in a federal jail. The decision below is thus in conflict with *Metheany.*

Similarly, the decision below is in conflict with this Court's decision in *McElroy* v. *United States,* 164 U.S. 76, 80 (1896). This Court there held that indictments may not be consolidated "in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried." Yet that is precisely what happened here; defendants were charged with entirely separate crimes, but tried together. Prejudice was bound to result. It did.

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[6] Rule 8(b), Fed. R. Crim. Proc. permits joinder of defendants if "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions *constituting an offense or offenses.*" (Emphasis supplied.) But there was no allegation of either defendant having participated in the other's offense; the sole link alleged between the two offenses was Mittelman's later using petitioner's affidavit in support of Mittelman's motion. This, however, was not an allegation of participation by either defendant in any act or transaction of the other which constituted perjury; it is not mere participation in the same acts which permits joinder, but participation in acts or transactions which constitute an offense. Since no such participation was alleged, the joinder was clearly improper under the plain language of 8(b).

POINT V

The Trial Court instructed the jury that the affidavit (and similarly, the grand jury testimony) of petitioner's co-defendant was admissible against petitioner if petitioner's affidavit was submitted as part of a common agreement to secure a new trial. Since such an agreement is legal, and the jury was not required to first find anything illegal in the agreement's objective or means of execution, hearsay evidence was admitted against petitioner which would have been inadmissible even in a conspiracy case. The affirmance below poses a serious threat to the fair administration of justice in Federal cases. It is in conflict with decisions of this Court and other courts of appeals.

A. The decision below permits a wider scope of admissibility of evidence in prosecutions of defendants charged separately and independently in one indictment than if they were charged with conspiracy, joint action, or aiding and abetting. It thus presents dangers even greater than those in conspiracy prosecutions.

The Court below held that the acts and declarations of petitioner's co-defendant Mittelman were chargeable to petitioner since, said the Court, petitioner and Mittelman were "joint actors in furtherance of a common illegal plan", and the evidence against petitioner could have been admitted against him on separate trial (App. A. p. 7a). But the jury had never been required to find the existence of an illegal plan; the instructions governing admissibility (*supra,* pp. 8-9) did not require an *illegal* plan (or illegal objective or means) to be found, but merely required the finding of a "common agreement or undertaking to secure a new trial" for Mittelman by motion—and such a plan, far from being illegal, is authorized by Rule 33. The mere legal agreement, *per se,* was enough to permit the use of Mittelman's *ex parte* declarations against petitioner in determining whether petitioner's own affidavit had been perjurious.

The decision below thus gives prosecutors a stronger weapon than the conspiracy statute, in the absence of a conspiracy charge. Had a conspiracy been alleged here, Mittelman's declarations would not have been admissible against petitioner unless there was first established either a conspiracy to commit an illegal act or to commit a legal act by illegal means, plus petitioner's being a member of such conspiracy. But under the decision below, there need be only an agreement to commit a legal act by legal means to make a defendant's declarations admissible against a separately charged co-defendant—all in the absence of a charge of conspiracy, joint action [7] or of aiding and abetting. Moreover, there was simply no evidence that Mittelman's acts and declarations were in furtherance of a common illegal plan, of which petitioner might have had knowledge, either in Mittelman's affidavit or in his grand jury testimony. On the contrary, the evidence negated the possibility of any belief on petitioner's part, when he executed his affidavit, that Mittelman would later submit an affidavit stating, as it did (*supra*, pp. 5-6), that petitioner was unavailable when the defense began.[8]

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[7] Though petitioner was indicted solely for the commission of perjury by himself, the case went to the jury on the so-called government theory that defendants "submitted affidavits as part of a mutual understanding, plan and agreement to support a motion for a new trial * * *" (GA 99a), duly excepted to by petitioner (JA 56). Petitioner was thus convicted on a charge not made in the indictment, in violation of due process. *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *DeJonge* v. *Oregon*, 299 U.S. 353, 362 (1937).

[8] Mittelman had testified that, before petitioner signed the final version of his affidavit, Mittelman had discussed with petitioner that he had had a meeting with him at the Royalton the night before the defense began (JA 17). Petitioner testified that, at the time of the signing of the affidavit, he told Mittelman's attorney that the defense could have called him as a witness if they had wanted to (JA 40). Under either or both of these versions of the facts, there was simply no reason for petitioner to have assumed that Mittelman would later put in an affidavit negating petitioner's availability to the defense.

Nor was there any evidence independent of Mittelman's affidavit that Mittelman's affidavit was in furtherance of a common illegal plan attributable to petitioner. It was therefore inadmissible, for evidence cannot be admissible when the only foundation for its reception lies in the challenged evidence itself. The Second Circuit itself previously recognized this principal that evidence cannot pull itself into admissibility by its own bootstraps,[9] but did not here follow its own prior ruling.

The context in which these proceedings arose makes the decision below doubly dangerous. For the result of the Second Circuit's approval of the District Court's charge is that if a witness knowingly gives an affidavit for use on a motion, as part of an "agreement" to secure the motion's objective (which will be the case almost any time a witness gives an affidavit), all acts or declarations of the party in behalf of whom the affidavit is submitted may be admissible against the witness, though he be ignorant of them, and have no reason to have believed that they would occur —without any opportunity being afforded to the witness to cross-examine the party. We emphasize that this is not a *reductio ad absurdum*. It is the necessary result of the Second Circuit's approval of the District Court's charge.

This Court has "repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957). But the "serious threat to fairness in our administration of justice" posed by the tool of conspiracy prosecutions [Mr.

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[9] In *United States* v. *Annunziato*, 293 F. 2d 373, 378 (2nd Cir. 1961), cert. den., 368 U.S. 919 (1961), the Second Circuit ruled that a statement of a co-conspirator is admissible in the absence of a charge of conspiracy, when evidence, *"other than that whose admissibility is under challenge,* disclosed one." (Emphasis supplied.)

Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U.S. 440, 446 (1949)] is a nothing compared to the threat here. For here we have the spectacle of declarations clearly inadmissible even in a conspiracy case being admissible when individuals are separately and independently charged in the same indictment with separate and distinct offenses.[10]

B. The decision below denied petitioner his right to confront and cross-examine his separately and independently charged co-defendant.

Until the case at bar, apparently no federal court had ever held that in a case where the indictment alleges neither conspiracy, joint action, nor aiding and abetting, the acts and declarations of a co-defendant who does not take the witness stand may be considered against the other defendant. The decision below is in conflict with this Court's ruling, in *Pointer* v. *Texas*, 380 U.S. 400 (1965), that the Sixth Amendment's requirement of confrontation precludes admission in evidence of testimony previously given by an alleged co-participant in the crime, when the defendant has no opportunity to cross-examine the alleged co-participant. Since the criminal records of both defendants in the case at bar were known to the government, and neither defendant could have been expected to take the stand, the constitutional violation would seem aggravated.

While evidence of one actor against the other, in pre-*Pointer* days, might have been considered when defendants were charged jointly with the same crime, when such evi-

[10] If the decision below be good law, conspiracy prosecutions may soon be a thing of the past. Far better—from the prosecutor's view—to charge individuals in separate and independent counts within the same indictment and have a scope of admissibility of evidence greater that the present scope of admissibility in conspiracy cases. Far worse—from the viewpoint of justice.

dence was part of the *res gestae* [*St. Clair* v. *United States*, 154 U.S. 134, 149 (1894)], this Court there ruled that such evidence is not admissible unless "the necessary incidents of the litigated act" which "must stand in immediate casual [*sic*] relation to the act" (*id.* at 149-150)—tests which were not applied below, and which Mittelman's affidavit could not possibly meet. His affidavit was not shown to be part of the *res gestae* of petitioner's alleged perjury by any competent proof.

When the Second Circuit had in the past permitted admissibility of evidence as to a co-defendant's declarations [*United States* v. *Annunziato, supra*, p. 21; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2nd Cir. 1945)], in every such case the one testifying has been available for cross-examination. This rule of admissibility has now been widened to where it is more than merely an unwise rule of evidence; by effectively denying cross-examination and confrontation by one defendant of the other, it now constitutes an affront to due process and the Sixth Amendment. It is in conflict with *Pointer*, and *St. Clair* (especially as implicity modified by *Pointer*). This decision below should be reviewed (and reversed), unless the present minimum modicum of fairness in mass trials is to become defunct.

C. Even if defendants had been jointly indicted, the state of mind of one could not have been inferred from the things the other said or did.

In any event, under decisions of this Court and other Courts of Appeals, the rule permitting even limited use of a joint actor's declarations against his co-defendant is simply inapplicable to perjury cases and to those in which there is neither charge of conspiracy nor joint action. Thus, this Court has ruled that "* * * there can be no successful prosecution for false swearing" in the absence of proof of "the state of a man's mind [which] must be inferred from the things *he* says or does." *Communications*

Assn. v. *Douds,* 339 U.S. 382, 411 (1950) (emphasis supplied). We are unaware of any federal decision permitting proof of the state of a man's mind from the things another says or does.[11]

D. A severance should have been granted, in view of the trial court's failure to (1) carefully compartmentalize the proof as to each defendant, and (2) give a clear instruction as to the non-admissibility of Mittelman's grand jury testimony against petitioner. Petitioner was prejudiced by denial of the severance.

Not only was the Court of Appeals in error in affirming the conviction on the theory that defendants were "joint actors in furtherance of a common illegal plan"—but the denial of a severance was in conflict with decisions of this Court and of another Court of Appeals. Thus, even when there has been at one time a conspiracy charge in a case, it is proper to deny a motion for severance only when "the proof was carefully compartmentalized as to each petitioner." *Schaffer* v. *United States,* 362 U.S. 511, 515 (1960). But the rule below is that in the absence of a conspiracy, proof against one defendant may be considered against all, and that even what would be a post-conspiracy admission in a conspiracy case (*i.e.,* Mittelman's grand jury testimony) may be submitted to the jury without the clear warning as to its admissibility solely against the declarant,

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[11] The decision below is in conflict with that of the Eighth Circuit, which held that "It is fundamental that no man can confess for any one but himself." *Hale* v. *United States,* 25 F. 2d 430, 438 (8th Cir. 1928). There the court reversed the denial of a severance where appellant had been convicted of aiding and abetting in a murder and tried with his principal, ruling that the principal's confession could be considered only against the principal.

as required by this Court in *Delli Paoli* v. *United States*, 352 U.S. 232, 233 (1957).[12]

The Court below ruled that Mittelman's grand jury testimony, "even if considered by the jury against Jones in violation of the instructions,[13] was merely cumulative to the independent relevant and convincing documentary evidence" fixing the date of the Royalton meeting as May 4 (App. A, pp. 10a-11a). For purposes of this petition, we assume *arguendo* that this statement is correct, and that in fact May 4, 1962 was the date of the Royalton meeting. But in other crucial respects, not adverted to below, Mittelman's grand jury testimony was extremely damaging to petitioner, non-cumulative—and indeed the sole evidence.

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[12] In *Delli Paoli*, this Court upheld, by a narrow 5-4 margin, the admission in evidence of a confession of a co-defendant made after the termination of the alleged conspiracy, when the trial court "stated clearly that the confession was to be considered only in determining the guilt of the confessor and not that of other defendant" (352 U.S. at 233). In the case at bar, the trial court's instructions (quoted *supra* at pp 8-9) as to the admissibility of Mittelman's grand jury testimony against petitioner (given after any "conspiracy" must have ended) were far from clear; indeed, their confusion was an open invitation for the jury to consider Mittelman's grand jury testimony against petitioner. (This may be the explanation of the sentence in the opinion below indicating that the jury may have considered Mittelman's grand jury testimony against petitioner "in violation of the instructions". App. A., p. 10a.) For after the trial court stated that Mittelman's grand jury testimony was received only as to Mittelman, it stated that similarly, Mittelman's affidavit is not admissible as to petitioner unless there is first found petitioner's connection therewith—thus indicating that Mittelman's affidavit and his grand jury testimony were to be considered similarly and that both were potentially admissible against petitioner.

Clear prejudice resulted from the jury's consideration of Mittelman's grand jury testimony; we refer to the immediately succeeding text of this Petition.

[13] That its consideration was not in violation of the instructions, see n. 12, *supra*.

For petitioner, in his own grand jury testimony, had testified that the Royalton meeting occurred during his second trip to New York pursuant to government subpoena, and that it was his belief that the Government had not yet rested its case, since he was still here at government expense (JA 34, 43, 44, 46, 47). If this was in fact his belief —and the contrary was never shown—his affidavit was not false in failing to state that the May 4 meeting occurred after the Government had rested. But Mittelman testified that when petitioner was here, petitioner had repeatedly inquired the status of the case (JA 26). The jury could well have inferred from this testimony that petitioner well knew that the May 4 meeting occurred after the Government first rested.[14] Such an inference might have been reinforced by Mittelman's testimony that petitioner had told him that petitioner had been excused as a government witness just before the government rested its case (JA 19), whereas petitioner had testified that he was excused after his second trip to New York (JA 37), which he believed was while the government was still presenting his case. Absent Mittelman's testimony of petitioner's admission that he had been excused as a government witness just before the government rested its case, and his testimony that he had discussed the Royalton meeting with petitioner on the eve of petitioner's affidavit (JA 17), there was no proof whatsoever as to petitioner's state of mind when he executed his affidavit. Since Mittelman's grand jury testimony was then the *only* evidence as to petitioner's state of mind, the jury could not have convicted without considering this testimony.

Moreover, by Mittelman stating his disagreement with petitioner as to the chronology (JA 18-19, 28), he thrust the entire blame for any errors in both affidavits upon petitioner, while petitioner indicated that there had been no such discussion (JA 38).

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[14] Cf. the Court's charge to the jury: "* * * an inference being evidence * * *" (GA 116a).

Absent Mittelman's grand jury testimony, there was nothing to show that petitioner had done anything except to make a bona fide mistake that the Royalton meeting was during the prosecution's case. Mittelman's grand jury testimony, the only evidence of petitioner's state of mind, was thus severely prejudicial to petitioner—albeit cumulative to other evidence establishing the date of the Royalton meeting.

POINT VI

The ambiguous indictment failed to meet Sixth Amendment requirements, and the legal evidence in support of the indictment was clearly insufficient.

In paragraph 4 of petitioner's affidavit, he had alleged that it was suggested that he leave town "at the last moment and just before the government rested its case * * *". But the Government rested twice, on May 12, 1960 as well as May 2, 1960. Which was "the last moment"? Obviously, the second resting on May 12. Therefore, the existence of the May 4 Royalton meeting showed no perjury.

The indictment failed to allege which resting the affidavit referred to. It was inherently ambiguous, and thus did not meet Sixth Amendment requirements. In deciding otherwise, the Court below rendered a decision in conflict with that of the District of Columbia Circuit which affirmed [232 F. 2d 334 (D. C. Cir. 1955)] the District Court's decision in *United States* v. *Lattimore,* 127 F. Supp. 405 (D.D.C. 1955).

But in any event, the evidence was insufficient, not merely under the strict requirements of the perjury rule, but even under normal rules of evidence. The gist of the error below was the Court's concentration on proof of petitioner's attending a May 4, 1960 meeting with Mittel-

man at the Royalton. We concede that, for purposes of this proceeding here, the proof adequately showed the existence of the meeting at such time and place. Yet this does not establish petitioner's wilfulness in executing his affidavit.

The Court below approved the jury finding of wilfulness "from the manner and context in which they [the paragraphs of petitioner's affidavit] were used." It ruled that the jury was justified in its interpretation of petitioner's affidavit "since they were prepared and used in connection with Mittelman's affidavit containing the final sentence" of his paragraph 52 (App. A, p. 10a). However, the plain fact of the matter is that petitioner's affidavit was *not* prepared or used by petitioner in connection with Mittelman's affidavit. On the contrary, there is not even a hint anywheres in the record that petitioner had any idea whatsoever of what Mittelman would put in the 52nd paragraph of Mittelman's affidavit, executed more than six weeks after petitioner's affidavit, when Mittelman was in prison.[15] Yet the opinion below charges petitioner with such knowledge simply because he gave Mittelman an affidavit knowing it would be used in an attempt to secure a new trial. Petitioner's wilful intent, it finds, is established by Mittelman's later use and interpretation of petitioner's affidavit—of which petitioner had no knowledge.

We submit that this does not satisfy even the normal rules of evidence. Nor was wilfulness found on the basis of testimony of two witnesses, or of one witness with corroborating circumstantial evidence, or documentary evidence plus admissions of the accused; to satisfy the perjury rule. True, the existence of the May 4 Royalton meeting was adequately proved, but there was simply no proof of wilfulness at all on petitioner's part (*aliunde* the clearly

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[15] That petitioner could not possibly have expected Mittelman to swear as he did, see n. 8, *supra*, p. 20.

inadmissible Mittelman grand jury testimony). Wilfulness was affirmed solely on the basis of Mittelman's use and interpretation of petitioner's affidavit. Moreover, as we have shown above, it was error to permit the use of Mittelman's affidavit against petitioner.

Assuming for purposes of this Point that petitioner's grand jury testimony was property introduced into evidence against him, it showed that the Royalton meeting occurred during his second trip to New York, when he thought that the government had not rested its case because he was still being paid by the government. Was petitioner not being paid by the government at that time, surely the government would have so proved. Thus, petitioner's testimony is uncontradicted (save by the Mittelman grand jury testimony) that when the May 4 Royalton meeting occurred, he believed that this was during the prosecution case, not the defense. The fact that the government had actually rested its case by this time, then, was irrelevant, for the meeting of May 4th (the sole meeting relied on by the government in the indictment and at the trial) was believed by petitioner to have occurred *before* the government had rested its case. Thus, wilfulness as charged in the indictment was lacking.

So, too, there was no evidence to suggest that petitioner had any reason to believe that there was any importance to be attached to the sequence or timing of events recited in paragraphs 4 and 5 of his affidavit. There was no showing that petitioner knew of the diligence requirement in securing a new trial. Petitioner testified before the grand jury that he was merely asked to give an affidavit as to lies by two prosecution witnesses at Mittelman's trial, and that petitioner could not be reached after he left town the last time (JA 38). He believed both statements to be true. He made them. There was no showing that he wilfully lied.

CONCLUSION

This Court should grant certiorari, the judgment below should be reversed, and the indictment dismissed.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

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No. 298—September Term, 1966.

(Argued February 8, 1967 Decided March 14, 1967.)

Docket No. 30925

UNITED STATES OF AMERICA,

Appellee,

—v.—

PAUL R. JONES and LEO B. MITTELMAN,

Appellants.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal by Paul R. Jones and Leo B. Mittelman from judgments of conviction of perjury and sentence thereon after jury trial in the United States District Court for the Southern District of New York, William B. Herlands, *Judge.*

Affirmed.

SMITH, *Circuit Judge*:

Paul R. Jones and Leo B. Mittelman were convicted after jury trial, each on one separate count of perjury in the United States District Court for the Southern District of New York, William B. Herlands, *Judge*, and they appeal. We find no error and affirm the judgments.

Appendix A

In 1960 Mittelman was convicted in the Southern District of New York of mail fraud and conspiracy to sell unregistered securities. The conviction was affirmed, *United States* v. *Crosby, et al.*, 294 F. 2d 928 (2d Cir. 1961), cert. denied sub nom. *Mittelman* v. *United States*, 368 U. S. 984 (1962). On May 15, 1962 Mittelman submitted a motion for a new trial on the ground of newly discovered evidence and government suppression of evidence favorable to the defense. Submitted with the motion were affidavits of Jones executed April 2, 1962 and Mittelman executed May 14, 1962. The convictions for perjury here under review were based on statements in those affidavits to the effect that newly discovered evidence existed in that Jones could testify that the government had knowingly used perjured testimony of witnesses Holland and Carroll and that Jones had not been available to reveal this to Mittelman from the time the government rested until months after the conclusion of the trial.[1]

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[1] The Indictment in the case at bar contained the following allegations:

> 1. From on or about the 15th day of February 1960, up to and including the 24th day of May 1960, in the United States District Court for the Southern District of New York, the trial of United States v. Francis Peter Crosby, et al., Docket Number C 157-56, was in progress. LEO B. MITTELMAN was one of the defendants on trial in the above case. The Government finished presenting its evidence and rested its case on or about the 2nd day of May 1960. On or about the 5th day of May 1960, the defense began presenting its evidence in the above case.
>
> 2. On or about the 17th day of June 1960, in the United States District Court for the Southern District of New York, a judgment of conviction was entered against LEO B. MITTELMAN for violating Title 18, United States Code, Sections 2 and 1341 (mail fraud), and Title 18, United States Code, Section 371 (conspiracy to sell unregistered securities in violation of Title 15, United States Code, Sections 77e(a)(1), (a)(2) and 77x). By the terms of the said judgment, the said LEO B. MITTELMAN

Appendix A

During the course of the trial in *United States* v. *Crosby*, witnesses Holland and Carroll had testified on behalf of the government in a manner unfavorable to Mittelman. Jones had been subpoenaed by the government as a possi-

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was sentenced to imprisonment for 5 years and to a succeeding 5-year probationary term.

* * *

6. On or about the 15th day of May 1962, the said LEO B. MITTELMAN filed and caused to be filed in the United States District Court for the Southern District of New York a motion for a new trial based, in part, on alleged newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. It was necessary and material to the said motion that the said LEO B. MITTELMAN show that the alleged newly discovered evidence was in fact newly discovered since the trial and could not have been discovered previously in the exercise of due diligence. In support of the said motion there were submitted the affidavits of PAUL R. JONES dated April 2, 1962, and LEO B. MITTELMAN dated May 15, 1962, among others.

7. The allegations of paragraphs one through six herein are realleged for each of Counts 1 and 2 as though fully set forth therein.

COUNT ONE

The Grand Jury charges:

8. On or about the 2nd day of April 1962, in the Southern District of New York, PAUL R. JONES, the defendant herein, having duly taken an oath before a competent tribunal, officer and person, to wit, a notary public, in a case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose and certify truly, and that a written testimony, declaration, deposition and certificate by him subscribed is true, unlawfully, wilfully, knowingly and contrary to such oath did state and subscribe to material matter which he did not believe to be true, more particularly as follows:

"4. * * * I was in New York for many weeks during the trial waiting to testify. At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town.

ble government witness and had been in contact with Mittelman. The government rested its case in chief May 2, 1960 without calling Jones.

"5. The government told me about 5:00 o'clock in the evening that it was not going to use me. That same evening my wife and I packed and we left New York City in my automobile, and we started traveling. The first night we stayed in Maryland; from Maryland we went to Washington, D. C., where we stayed several days. Then we continued our travelling by automobile to North Carolina and from there to Texas. This travelling from New York City to Texas took some three weeks. During this period it would have been impossible for any one other than those whom I telephoned to locate me and needless to say, I did not telephone Mr. Mittleman or any of the other defendants in the instant case."

9. The aforesaid testimony, declaration and deposition of PAUL R. JONES, the defendant herein, as he then and there well knew, was untrue in that he met and conferred with LEO B. MITTELMAN on May 4, 1960, after the Government had rested its case, and remained in New York City until on or after May 6, 1960, at which time the defense was presenting its evidence. (Title 18, United States Code, Section 1621.)

COUNT TWO

The Grand Jury further charges:

10. On or about the 15th day of May 1962, in the Southern District of New York, LEO B. MITTELMAN, the defendant herein, having duly taken an oath before a competent tribunal, officer and person, to wit, a notary public, in a case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose and certify truly, and that a written testimony declaration, deposition and certificate by him subscribed is true, unlawfully, wilfully, knowingly and contrary to such oath did state and subscribe to material matter which he did not believe to be true, more particularly as follows:

"52. *The Jones affidavit.* I knew Paul R. Jones before the trial. I had met him in the summer of 1955, and I had last seen him in Birmingham on or about August 11, 1955 when I delivered 500,000 shares of Homestead stock to him which he

Appendix A

The government, in the case at bar, produced evidence that after the government rested, Mittelman, who had been informed by Jones that he could contradict Holland and Carroll as to some of their testimony, arranged a meeting of a number of the defendants and their counsel at the Royalton Hotel on May 4, 1960 at which Jones was present and talked at some length but apparently in a somewhat rambling fashion. Unimpressed by their observation of Jones, and informed of his criminal record, counsel decided not to call him as a defense witness. It is not clear whether Jones had gone to North Carolina when excused by the government May 2, and had come back at Mittelman's call on May 4, or whether he stayed on through May 4 or returned to North Carolina and came back once again after May 4, although it appeared that Mittelman's brother on May 6 cashed a check of Mittelman's for $300 to pay Jones' expenses.

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had stated he could sell. I met him again on several occasions during the trial, to which he had been subpoenaed as a witness. I discussed the case with him in a general way, and he told me that he was under instructions to report to the prosecutors at 4:30 P.M. at the end of each court session. He also told me that he expected to be called as a government witness, and that if he was not called and was released from the subpoena no one would be able to locate him. I confess that I could not decide whether to subpoena him or not. I did not have his confidence. Before I could make up my mind whether to issue a subpoena, or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located."

11. The aforesaid testimony, declaration and deposition of LEO B. MITTELMAN, the defendant herein, as he then and there well knew, was untrue in that he met and conferred with PAUL R. JONES on May 4, 1960, after the Government had rested its case, and just before the defense was to begin, and that PAUL R. JONES remained in New York City until on or after May 6, 1960, at which time the defense was presenting its evidence. (Title 18, United States Code, Section 1621.)

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The motion for new trial, and a companion motion for correction of an allegedly illegal sentence were denied. Notices of appeal were filed and the denial of correction of sentence was affirmed, 314 F. 2d 654 (2d Cir.), cert. denied 373 U.S. 923 (1963). The appeal from the denial of new trial was abandoned.

On Jones' appeal from the prejury conviction he contends principally that the evidence was insufficient, that it was error to deny his motions for severance, and to deny inspection of Jones' Grand Jury testimony until late in the government's case, and attacks the government's summation as improper and prejudicial. Jones also joins in Mittelman's contentions, which are, in addition to those of Jones, chiefly that it was error to deny earlier production of Mittelman's Grand Jury testimony, that the allegedly perjurious statement was not material to the issue to which the affidavit was addressed and that the indictment should have been dismissed since proof of a former conviction could not properly be used against him.

Neither Jones nor Mittelman took the stand in this perjury trial. Both, however, had testified before the Grand Jury, and transcripts of the testimony of each were read in evidence, with instructions, however, that it was not to be considered except as to the one whose testimony it was.

I.

Both object to the joinder for trial of the two counts of the indictment, one count charging Jones, the other Mittelman. These objections fail for two reasons. The indictment charged the preparation by Jones and Mittelman of false affidavits as to Jones' availability, to be filed with Mittelman's motion. Thus, the joinder of the two counts alleging that the defendants had "participated in the same act or transaction or in the same series of acts or trans-

actions constituting an offense or offenses" was well within the terms of Fed. R. Crim. P. 8(b). *United States* v. *Cohn*, 230 F. Supp. 587 (S. D. N. Y.), mandamus denied sub nom. *Application of Gottesman*, 332 F. 2d 975 (2d Cir. 1964). In the second place, no grounds for relief from prejudicial joinder under Rule 14 were shown. There need be no charge of conspiracy to make actions and declarations of joint actors in furtherance of a common illegal plan admissible against each actor. *United States* v. *Annunziato*, 293 F. 2d 373, 378 (2d Cir.), cert. denied 368 U. S. 919 (1961); *St. Clair* v. *United States*, 154 U. S. 134, 149 (1894); *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2d Cir. 1945); *People* v. *Luciano*, 277 N. Y. 348 (1938). The evidence admitted against both could therefore have been admitted against either on separate trial and no prejudice from the joinder can be made out. See *United States* v. *Granello*, 365 F. 2d 990, 995 (2d Cir. 1966).

II.

The falsity of the statements of unavailability of Jones after May 2 was clearly proved by the testimony of Steinberg, one of defense counsel in the principal case as to the meeting in the described suite at the Royalton to assess Jones' desirability as a witness, that it was the sole meeting he attended there and that Jones talked at length at the meeting, taken together with the testimony of hotel employees and the plainly admissible hotel records fixing the date as May 4, reinforced by Mittelman's check for Jones' expenses cashed by Mittelman's brother on May 6.[2]

[2] On appeal from the convictions the evidence is to be viewed in the light most favorable to the government and all permissible inferences be drawn in its favor. *United States* v. *Kahaner*, 317 F. 2d 459, 467 (2d Cir.), cert. denied 375 U. S. 836 (1963); *United States* v. *Hall*, 346 F. 2d 875 (2d Cir.), cert. denied 382 U. S. 910 (1965); *United States* v. *Marchisio*, 344 F. 2d 653 (2d Cir. 1965).

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III.

The evidence was clearly sufficient against each appellant to meet the strict requirements [3] of the prejury rule calling for the testimony of two witnesses or the testimony of one witness with corroborating circumstantial evidence. See, e.g. *United States* v. *Marchisio, supra,* n. 2; see also *United States* v. *Goldberg,* 290 F. 2d 729 (2d Cir.), cert. denied 368 U. S. 899 (1961), to the effect that documentary evidence plus the admissions of the accused are sufficient, as in the case at bar.

IV.

Judge Herlands was concerned over the possibility of prejudice in this trial if it should be revealed to the jury that Mittelman had been convicted in the *Crosby* case. The judge went to extraordinary lengths to attempt to keep knowledge of the conviction from the jury. Now appellants contend that he did not go far enough, for in spite of all precautions the word "prosecutor" crept in, and the claim is that this must have revealed the whole situation to the jury. If this were important, we would be inclined to hold that this was insufficient to place the earlier crime before the jury so that appellants were convicted because of it rather than the evidence of the instant offense. We need not, however, waste much time in speculating how much the jury did, in fact, divine, for the fact of the conviction was relevant and material to show the strong motive the fact provided for the making of the false affidavits, and we will not deprive the trier of this evidence merely

[3] Some authorities maintain that the peculiar rule for perjury cases is too strict. See Report of the President's Commission on Law Enforcement and Administration of Justice, U. S. Government Printing Office 1967, p. 201.

because the crime here necessarily bore a close relationship with an earlier crime. The essence of the crime related to the conviction. Reference to another crime is barred only if introduced solely for the purpose of showing that the defendant "committed the crime on trial because he is a man of criminal character." *United States* v. *Bozza,* 365 F. 2d 206, 213 (2d Cir. 1966). Cf. *Spencer* v. *Texas,* — U.S. — (January 23, 1967).

V.

Mittelman contends further that even if the statements be found untrue as used, they were not material to the proceeding in which they were used, his application for new trial. Materiality of the statements was correctly held to be an issue for the court, which held them material. *United States* v. *Siegel,* 263 F. 2d 530, 533 (2d Cir.), cert. denied 359 U. S. 1012 (1959). The claim that they were erroneously held material must be rejected. Even if, as is now claimed, the main thrust of the motion was not newly discovered evidence that Jones would contradict government witnesses Carroll and Holland, but that Jones would testify that he had informed the government of the claimed falsity of Holland's and Carroll's testimony and the government had used it regardless and that Jones had not revealed this to Mittelman until after the trial, the statements would still be material. The court before which the motion was pending would be interested in knowing not only whether Jones had told those details to Mittelman, but whether he was available, whether he talked at all to Mittelman, when and to what extent, so that not only the truth of the statements could be tested, but also Mittelman's diligence in inquiring. Diligence is material on any claim of newly discovered evidence. *United States* v. *Pellegrino,* 273 F. 2d 570 (2d Cir. 1960); *United States* v. *Costello,* 255 F. 2d 876, 879 (2d Cir.), cert. denied 357 U. S. 937 (1958); *United States* v. *Abrams,* 357 F. 2d 539, 550 (2d Cir.), cert. denied 384 U. S. 1001 (1966).

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VI.

Jones contends that his affidavit was not perjurious because paragraphs 4 and 5 may be taken separately and as referring to two separate dates as to which they were not shown to be untrue. This claim is, however, of no avail, for even if each paragraph, taken separately out of context were true, though relating to different times, if in the natural meaning in the context in which used they were materially untrue, perjury was established. See *Meyers* v. *United States,* 171 F. 2d 800, 806-7 (D. C. Cir. 1948), cert. denied 336 U. S. 912 (1949). And the jury could validly find wilfulness from the manner and context in which they were used. The wording gives no hint that they are not parts of a connected narrative, and since they were prepared and used in connection with Mittelman's affidavit containing the final sentence of paragraph 52 entitled *The Jones Affidavit,* "Before I could make up my mind whether to issue a subpoena, or depend on his being called by the prosecutor, he was suddenly excused just before the defense was to begin, and he was not to be located," the court to which they were addressed, and the jury here were fully justified in interpreting them as representing that Jones had suddenly and unexpectedly become unavailable to Mittelman. The jury in the light of the proof of the Royalton meeting was also entirely justified in finding that the statements were deliberately false.

VII.

We fail to see any prejudice in the admission of the Grand Jury testimony under proper limiting instructions. Mittelman's testimony before the Grand Jury fixing the date of the Royalton meeting as May 4, even if considered by the jury against Jones in violation of the instructions,

was merely cumulative to the independent relevant and convincing documentary evidence. Compare *United States* v. *Casalinuovo,* 350 F. 2d 207, 212 (2d Cir. 1965).

VIII.

Appellants moved pre-trial and during the trial for inspection of their Grand Jury testimony which was refused until late in the presentation of the government's case. We find no prejudicial error in the failure earlier to grant inspection of the Grand Jury testimony. While discovery under Rule 16(a), F. R. Crim. P., might be granted even in cases such as this pending prior to the amendment to the rule effective July 1, 1966 "so far as just and practicable," grant of discovery was not mandatory. Even if it were, we could find no prejudice to appellants here, for full transcripts were supplied before any portion was offered in evidence, and overnight recess was thereafter granted to enable counsel "to understandably and knowledgeably digest" the transcripts.

We have examined appellants' other contentions and find none which require further discussion.

The judgments of conviction are affirmed.

APPENDIX B

Constitutional Provisions, Statutes and Rules Involved

UNITED STATES CONSTITUTION

Article I, § 1:

"All legislative Powers herein granted shall be vested in a Congress of the United States. * * *"

Article I, § 7:

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States * * *."

Article I, § 8:

"The Congress shall have Power * * * To constitute Tribunals inferior to the Supreme Court; * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department * * * thereof."

Fifth Amendment:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * *."

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STATUTES

18 U. S. Code, § 1621, 62 Stat. 73, 78 Stat. 995:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury * * *."

Act of August 15, 1876, c. 304, 19 Stat. 206 [U. S. Comp. St. 1091, p. 662].

> "That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do."

Act of June 25, 1948, c. 646, § 39, 62 Stat. 869, 992, 994:

> "The sections or parts thereof of * * * the Statutes at Large enumerated in the following schedule are hereby repealed. * * *

	STATUTES AT LARGE				U. S. CODE	
Date	Chapter	Section	Volume	Page	Title	Section
1876 * * *						
Aug. 15	304	—	19	206	28	642."

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5 U. S. Code § 92, 29 Stat. 184:

"Taking Oaths or Acknowledgments. In all cases in which, under the laws of the United States, oaths or acknowledgments might be taken or made on June 22, 1874, before any justice of the peace of any State or Territory, or in the District of Columbia, they may be also taken or made by or before any notary public duly appointed in any State, District or Territory, or any of the United States commissioners, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

5 U. S. Code, § 92(a), 44 Stat. 830:

"Oaths Required by United States; administration by notaries public and other State officers. In all cases in which, under the laws of the United States, oaths are authorized or required to be administered, they may be administered by notaries public duly appointed in any State, District, or Territory of the United States, * * *."

18 U. S. Code, § 3772, 63 Stat. 98, 72 Stat. 348, 73 Stat. 11:

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt * * * in criminal cases * * * in the United States district courts * * *."

Appendix B

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8(b):

"Joinder of Defendants. Two or more defendants may be charged in the same indictment * * * if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. * * *"

Rule 14:

"Relief from Prejudicial Joinder. If it appears that a defendant * * * is prejudiced by a joinder of offenses or of defendants in an indictment * * * or by such joinder for trial together, the court may * * * grant a severance of defendants or provide whatever other relief justice requires."

Rule 33:

"* * * A motion for a new trial based on the ground of newly discovered evidence may be made * * *."

Rule 47:

"* * * A motion * * * shall be in writing unless the court permits it to be made orally. * * * It may be supported by affidavit."